



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**

**ELC NO. 242 OF 2015**

**FRED I. IMBATU.....PLAINTIFF**

**VERSUS**

**RASHID TOO KIPKURGAT.....DEFENDANT**

**RULING**

This is the ruling in respect of the defendant/applicant's application dated 26<sup>th</sup> September 2017 brought by way of a Notice of motion seeking for the following orders.

We hereunder wish to tender our written submissions on behalf of the defendant/applicant in

- 1) The courts orders to the effect of closing the plaintiffs case on 26.9.2017 and all consequential orders be set aside.
- 2) The court's order of closing the defence case on 26.9.2017 and all consequential orders be set aside.
- 3) On prayer (1) and (2) above being allowed (PW2) the Nandi County Land Surveyor be recalled for purposes of cross examination by the defence counsel.
- 4) On prayer (1) and (2) being allowed the defendant and his witnesses be allowed to tender their evidence before the court.

This application was filed under certificate of urgency when the same was pending for submissions. It was certified urgent and the applicant ordered to serve the application for inter parte hearing within 7 days. Counsel later agreed to canvass the application vide written submissions. The same were filed and a ruling date granted.

**DEFENDANT/APPLICANT'S COUNSEL'S SUBMISSIONS**

Counsel for the defendant submitted that the test in determining the correct approach in setting aside a default Judgement or order has been laid down clearly in the case of Mbogo vs. Shah [1968] EA. as follows:-

*"The courts discretion to set aside an ex parte judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or inexcusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice"*

Counsel stated that from the foregoing excerpt, the question that arises is whether the applicant has shown sufficient cause to warrant the court to set aside its orders. He gave background of the case by stating that when the matter came up for hearing for the first time on 12.6.2017 both parties were present and indeed the matter proceeded whereby the plaintiff testified.

Mr. Oduor Counsel for the defendant stated that from the court record it can be clearly noted that the defendant was absent and the main reason for his absence was that he is a Muslim and was observing the holy month of Ramadhan. He also submitted that the hearing date for 26.9.2017 which was given in the defendant's absence was to be communicated to him by one of his witnesses Mr. DAVID MALAKWEN CHOGE who was present in court but the said Mr. DAVID MALAKWEN CHOGE passed on four days later without informing the defendant of the hearing date.

Counsel further submitted that the defendant had shown sufficient cause why he did not attend court as his witness who was to notify him of the hearing date died four days later and Counsel had forgotten to put the matter in his diary.

Mr. Oduor counsel for the defendant also stated that he had informed the defendant that the period between 25<sup>th</sup> September, 2017- 29<sup>th</sup> September, 2017 being a legal Aid awareness week was coordinating the program since he was the Secretary General for the Law Society of Kenya North Rift Chapter as at that time and only came to know of the said matter when

he was notified of the same by other advocates. It was his submission that the instant application was filed under certificate of urgency without delay. Counsel submitted that the defendant's behavior is not that of a person who wishes to derail this instant suit but one who wishes for its just and expeditious disposal.

Counsel cited the case of Richard Ncharpi Leiyagu vs. IEBC & 20thers [2013] Eklr where the Court of Appeal sitting in Nyeri in setting aside exparte orders found that failure by counsel to diarize the date properly constituted an excusable mistake. He further relied on the case of Wachira Karani vs. Bildad Wachira [2016] eKLR the court in setting aside an exparte order was of the following view,

*" although it is an elementary principle in our legal system, that a litigant who is represented by an advocate, is bound by the acts and omissions of the advocate in the course of representation, in applying that principle, courts must exercise care to avoid abuse of the system and or unjust or ridiculous results. A litigant ought not to bear the consequences of the advocates default, unless the litigant is privy to the default, or the default results from failure, on the part of the litigant, to give the advocate due instructions. "*

Counsel therefore submitted that the defendant has shown sufficient cause and that he has triable issues in his defence and that the court has discretion to set aside the exparte orders. He therefore urged the court to allow the application as prayed.

### **PLAINTIFF'S COUNSEL'S WRITTEN SUBMISSIONS**

Counsel for the plaintiff/respondent opposed the application and stated that the orders the applicant is seeking for are discretionary and the court must be satisfied that the grant of the orders will serve the ends of justice. Counsel submitted that defendant's advocate who alleges that he was to blame for not putting the matter in his diary has not sworn an affidavit to explain the same as he wants to take the blame but still hide behind the client. It was Counsel's submission that the legal awareness week was just outside the Court where the case was proceeding. He stated that no good reason has been advanced to warrant the court to exercise its discretionary powers in this application.

### **Analysis and determination**

This is a case where the court is being asked to exercise its discretionary power to set aside its orders. The issue for determination is whether there has been sufficient explanation as to why the defendant and his counsel did not attend court when the matter proceeded exparte.

Having read the application, the supporting documentation, together with the submissions by both Counsel, I find that no sufficient cause has been shown to warrant the orders sought. It is true that the legal awareness week was outside the court and if counsel was there then he could have heard the clerk calling out for the defendant. It means the defendant was also not present. Why would the defendant send his witness to go to court to get the hearing date on his behalf yet he has a lawyer on record? Something is not adding up in all these explanations. There must be some untruth somewhere.

Having said that, in the interest of justice, I will only allow the reopening of the defence case to give the defendant an opportunity to tender his evidence. Other orders are hereby denied.

Defense hearing on 26<sup>th</sup> February 2018

Dated and delivered at Eldoret on this 18<sup>th</sup> day of December, 2017.

**M.A ODENY**

**JUDGE**

**Read in open court in the presence of:**

Mr. Keter holding brief for Mr. Musiega for Plaintiff/Respondent

Mr. Koech: Court Assistant

Mr. Oduor- Absent for Defendant/Applicant